

# Food & Beverage

## LITIGATION UPDATE

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## LITIGATION UPDATE

### Legislation, Regulations and Standards

#### U.S. Department of Agriculture (USDA)

##### [1] **USDA Sees No End to Cloned Animal Product Moratorium**

During a recent agriculture journalists' conference, a USDA official reportedly indicated that the agency has asked the cloning industry to continue to hold products from cloned animals and their progeny off the market. According to Bruce Knight, USDA undersecretary for marketing and regulatory programs, "We have asked those companies to continue with that voluntary moratorium. I do not have an end date on that." The Food and Drug Administration determined in January 2008 that products from cloned cattle, swine and goats as well as their offspring were as safe for consumers as the meat and milk products from uncloned animals, a conclusion that has reportedly been criticized by consumer advocacy organizations. USDA is apparently consulting with the industry and counterparts in other countries regarding health and safety issues. While some 600 cloned animals are estimated to exist in the United States, cloned products will not apparently appear on the market any sooner than four to five years after the voluntary ban is lifted, as any meat and milk would apparently come from the offspring of cloned animals. *See Reuters*, April 7, 2008.

##### [2] **USDA Finds Handling Violations in Slaughterhouse Audit**

USDA's Food Safety and Inspection Service (FSIS) has reportedly found that five of 18 slaughter facilities audited this month were in violation of humane handling standards. Agriculture Secretary Edward Schaefer apparently stated in a letter to U.S. Senator Herb Kohl (D-Wis.) that FSIS inspectors issued one notice of suspension, three non-compliance records and one letter of concern to five facilities processing cattle, cows and veal calves for human consumption. FSIS apparently suspended operations at one slaughterhouse because workers were insufficiently stunning animals, but the violation has since been resolved and the plant reopened. In addition, FSIS issued non-compliance records for excessive use of electric stunning prods, overcrowded holding pens and excessive balking at the stunning area. Schaefer declined to identify the facilities involved in the audit. *See Meatingplace.com*, April 9, 2008; *The Associated Press*, April 8, 2008.

#### Food Standards Agency (FSA)

##### [3] **U.K. Agency Considers Ban on Six Artificial Food Colorings Linked to Hyperactivity**

FSA's board has reportedly called for a voluntary European-wide ban on six artificial food colorings that a Southampton University study purportedly linked to changes in children's behavior and brain damage. Additional details about the study appear



in issue 230 of this Update. Health groups have criticized the agency for failing to act on the study, which was released in September 2007, other than to caution parents to limit their children's exposures.

FSA, which will request that U.K. ministers advocate for a voluntary removal before the European Union, has apparently been discussing the matter with manufacturers to see if they can find alternative ingredients and will voluntarily remove the colorings. FSA Chair Dame Deirdre Hutton was quoted as saying, "The evidence we have suggests it would be sensible for these [colorings] to be taken out of food. We would like to see the use of colors phased out over a period. That does not require mandatory action by the EU." Because EU legislation could take some time to enact and implement, FSA board members apparently found that the most prudent course would be a voluntary "phasing out" of the ingredients on an expedited basis.

While some foods, such as canned and mushy peas, battenberg and angel cakes, Turkish delight, and tinned strawberries, may ultimately have to be removed from the market because alternatives have been difficult to formulate, some manufacturers have indicated that they intend to remove the additives from their products. Other options the FSA board reportedly considered included maintaining the status quo, requiring point of sale notices, prohibiting the additives only from products primarily consumed by children, or restricting their use to products without alternatives. *See The Independent*, April 5, 2008; *Daily Mail* and *thisishampshire.net*, April 9, 2008; *FSA News Release* and *BBC*, April 10, 2008.

## Canada

### [4] Industry Criticizes Ontario Bill to Curb Food and Beverage Advertising

The New Democratic Party (NDP) of Canada has reportedly introduced in Ontario a private members bill titled the Consumer Protection Amendment Act (Advertising Food or Drink), which would prohibit marketing food and beverage products to children younger than age 13. The bill draws on a similar Quebec law enacted in 1981, but a coalition of major food companies known as the Concerned Children's Advertisers (CAA) has opposed the Ontario measure as redundant and argued that current regulations are sufficient to ensure responsible marketing practices. In addition, CAA has cited the doubling of Quebec's childhood obesity rate as evidence that advertising restrictions are ineffective, adding that the bill's blanket ban on all foods, including healthier options, would be difficult to enforce on the Internet and other types of new media. "No cause and effect or link has been determined between food advertising and obesity," a CAA spokesperson was quoted as saying. "Many food companies have tried to help children make healthy food choices through adhering to existing framework and voluntary code." *See Food NavigatorUSA.com*, April 8, 2008.

## Litigation

### [5] Poultry Producers Spar in Court over "Raised Without Antibiotics" Claims

A federal district court was reportedly scheduled to hear arguments on Tyson Foods Inc.'s motion to dismiss in a lawsuit filed by Sanderson Farms, Inc. and Perdue Farms, Inc., challenging Tyson's use of a



“raised without antibiotics” label. Also on the court’s April 7-8, 2008, agenda was the plaintiffs’ request for an injunction barring the label. Apparently, Tyson used the label with the approval of the Food Safety and Inspection Service (FSIS) in 2007. FSIS reportedly rescinded its approval because Tyson was producing chickens with ionophores, but later re-issued its approval as long as Tyson included a qualifier on product labels stating, “chicken raised without antibiotics that impact antibiotic resistance in humans.” The lawsuit was brought under the false advertising provisions of the Lanham Act, and Tyson contends that it should be dismissed as a back-door attempt to circumvent the federal government’s regulatory authority. Sanderson’s president and COO was quoted as saying, “The USDA’s approval does not provide blanket authority to false advertising.” See *meatingplace.com*, April 7, 2008.

#### [6] Starbucks Employees in New York Challenge Tip-Sharing Practice

According to a news source, Starbucks baristas in New York have decided to emulate baristas in California and Massachusetts by filing a lawsuit in a federal district court in Manhattan seeking to recover the tips that the company required them to share with shift supervisors. The company, which has reportedly vowed to vigorously challenge copycat lawsuits and continues to maintain that customers do not differentiate between shift supervisors and other hourly workers when tipping, is apparently appealing a California court’s award of \$100 million to a class of baristas in that state. Further information about the other tip-sharing lawsuits appears in issues 253 and 254 of this Update. See *Associated Press*, April 3, 2008.

## Other Developments

### [7] Government Officials Attend TACD Conference on Childhood Obesity

Industry representatives and officials from the Food and Drug Administration (FDA), the U.K. Food Standards Agency (FSA), and the European Commission (EC) this week attended the Generation Excess III conference in Washington, D.C., to discuss childhood obesity, food labeling and marketing practices. Convened by the Trans Atlantic Consumer Dialogue (TACD), the third annual conference included sessions on (i) “changing the food environment;” (ii) “providing consumers with useful information;” (iii) “food marketing: regulation, co-regulation, self-regulation;” and (iv) “improving product composition.” According to the Center for the Science in the Public Interest, speakers also canvassed “transatlantic approaches to tackling obesity and diet-related diseases, including restricting junk-food advertising aimed at children, phasing out artificial *trans* fats, improving nutrition labeling, and reducing salt content in processed foods.” New York University Professor Marion Nestle and EC Director of General Health and Consumer Protection Robert Madelin served as keynote speakers for the event. TACD is an advisory forum of more than 60 consumer groups established by the U.S. Department of State and the European Commission to provide policy statements and recommendations on food, e-commerce, intellectual property, and trade issues. See *CSPI Press Release*, March 17, 2008; *Food NavigatorUSA.com*, April 4, 2008.



## [8] Red Bull Introduces Cola Version of Energy Drink

Red Bull GmbH recently announced a cola version of its top-selling energy drink in seven countries over the next several months. Red Bull Cola will reportedly contain natural ingredients, including kola nut and coca leaf, as well as 45 milligrams of caffeine per 12-ounce can. Despite consumer advocate campaigns to lessen youth caffeine consumption, U.S. energy drink volume apparently rose 30 percent last year overall and 35 percent for Red Bull. The company hopes to take on traditional cola brands, some of which have also launched “energy colas” in an attempt to capitalize on the growing market and stave off a decline in soft drink sales. See *The Wall Street Journal*, April 7, 2008.

## Media Coverage

### [9] Trio of *New York Times* Articles Examine Causes, Effects of Rising Food Costs

Three recent articles published in *The New York Times* examine the multiple causes and effects of elevated food costs that, according to World Bank President Robert Zoellick, now threaten the social stability of 33 nations. An April 10, 2008, editorial titled “The World Food Crisis” notes that “the food import bill of developing countries rose by 25 percent” last year, while “corn prices have doubled in the last two years” and wheat recently “reached its highest price in 28 years.” Conceding that increased energy costs and a growing middle class in China and India have exacerbated food prices, the article also points to biofuel production in wealthier countries as responsible “for at least half the rise in world corn demand in each of the past

three years.” The *Times* editorial board thus advises the U.S. government and the European Union to end ethanol-friendly programs, arguing that the environmental benefits are outweighed by the impending food crisis. “Rich countries’ energy policies helped create the problem. Now those countries should help solve it,” the article concludes, adding that industrial nations should meet humanitarian aid estimates and provide agriculture support to increase local food production.

*Times* columnist Paul Krugman agrees with this synopsis in his April 7 op-ed piece, “Grains Gone Wild,” which contends that “a combination of long-term trends, bad luck – and bad policy” are to blame for the state of the global food supply. In particular, Krugman singles out the Iraq invasion for reducing oil supplies; inadequate climate change policies for contributing to droughts and bad weather; and the biofuel “scam” for draining corn and grain resources. He further attributes depleted food inventories to “major players in the grain market” that have grown “complacent” about reserving harvests for times of worldwide crop failure. “Cheap food, like cheap oil, may be a thing of the past,” opines Krugman, who also urges countries to heed the U.N. World Food Program’s distress signals.

In a related development, an April 9 article by *Times* reporter David Streitfeld covers the precarious future of the government’s Conversation Reserve Program, a 1985 Farm Bill initiative that pays farmers an average of \$51 an acre to set aside land for environmental preservation. As agricultural commodities increase in scarcity and price, many farmers have opted not to renew their conversation contracts with the U.S. government, instead choosing to plant lucrative crops like corn, soybeans, sunflowers, or wheat to capitalize on high



food prices. But while environmental and hunting groups Ducks Unlimited and Pheasants Forever campaign to retain the conservation program, a coalition of baking, poultry, snack food, ethanol, and livestock groups are urging the government to release more farmers from the decade-long arrangements. In particular, bakers have pointed to doubling flour prices and a complete lack of some grains as evidence that more land cultivation is needed to avert a food crisis. The National Association of Wheat Growers, however, has said that it opposes any efforts to break conservation contracts, warning that increased grain acreage will ultimately lower prices and harm farmers in the long-run. "If the government lets the land out and then crop prices fall, that's going to hurt a lot of farmers," one dairy owner was quoted as saying. "If it doesn't let the land out and prices keep going up, that will hurt a lot of consumers. If only we had a crystal ball."



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